

2011 IL App (2d) 100584-U
No. 2-10-0584
Order filed December 30, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-3705
)	
MARTIN MORALES,)	Honorable
)	Rosemary Collins,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: (1) Defendant showed no plain error in the trial court's denial of his motion to continue the trial, which essentially had already begun, so that he could engage a private attorney; substitute counsel was not ready, willing, and able to enter an unconditional appearance; (2) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 1 Defendant, Martin Morales, appeals from his convictions of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2 (a)(2) (West 2008)). He contends that the trial court denied him his right to counsel when it denied his request for a continuance in order to retain a private attorney. He also requests that a \$200 DNA analysis

fee be vacated. The State concedes the fee issue. We affirm the convictions and vacate the \$200 DNA analysis fee.

¶ 2

I. BACKGROUND

¶ 3 In November 2008, defendant was charged by indictment with multiple offenses, and a public defender was appointed. Between that time and the date of trial, the defense was responsible for nine continuances and agreed to three other continuances. Trial was set for February 1, 2010, and the court heard multiple motions *in limine* on that day.

¶ 4 On February 2, 2010, just before jury selection was to begin, defendant's appointed counsel told the court that he learned the night before that defendant's father had contacted the Vella law firm about representation in the case. Counsel asked that trial be continued so that defendant's father could have additional time to complete payment of a retainer to the Vella firm. The State objected. The court noted that the case had been pending since 2008, defendant had had many opportunities to obtain private counsel, and trial had essentially already started, with the court having already heard pretrial motions. The court further observed that the Vella firm was not present in court to indicate that it was going to enter an appearance. The court found that the motion was made to delay trial, the motion was denied, and the case proceeded to trial.

¶ 5 Defendant was found guilty of first-degree murder and aggravated discharge of a firearm. On February 24, 2010, Paul Vella filed an appearance as defendant's counsel. On March 9, 2010, the public defender was allowed to withdraw. Defendant was sentenced to 40 years' incarceration for first-degree murder and 25 years' for aggravated discharge of a firearm. He was also ordered to submit a DNA sample and pay a \$200 DNA analysis fee. However, defendant had previously submitted a DNA sample in 2003. Defendant filed a motion to reconsider sentence, but did not file

any motion mentioning the denial of the motion to continue. Defendant's motion to reconsider was denied, and he appeals.

¶ 6

II. ANALYSIS

¶ 7

A. Motion to Continue

¶ 8 Defendant contends that the trial court violated his right to counsel when it denied his motion to continue in order to retain a private attorney, without making an inquiry into whether the motion was made for purposes of delay. The State contends that, because defendant had not actually retained substitute counsel or otherwise shown that new counsel was ready and willing to enter an appearance, the denial of the motion was not an abuse of discretion.

¶ 9 Defendant failed to preserve the issue in a posttrial motion. In order to preserve an issue for review, a defendant must both offer a specific objection at trial and raise the matter in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under Illinois's plain-error doctrine, a reviewing court may consider a forfeited claim when: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 10 "[T]he constitutional right to counsel includes the right to be represented by retained counsel of one's own choosing." *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2010). "A determination of whether to grant a defendant's request for a continuance to allow time for retained counsel to appear requires balancing the fundamental right of the defendant to counsel of his or her choice

against the interests of the State, the courts, and the witnesses in the efficient disposition of cases without unreasonable delay.” *Id.* (citing *People v. Little*, 207 Ill. App. 3d 720, 723 (1990)). The denial of a motion to continue is within the sound discretion of the trial court and its ruling will not be disturbed unless that decision is an abuse of discretion. *Little*, 207 Ill. App. 3d at 724. The determination of the issue turns on the particular facts of each case. *Id.*

¶ 11 “ ‘In balancing the judicial interest of trying the case with due diligence and the defendant’s constitutional right to counsel of choice, the court must inquire into the actual request to determine whether it is being used merely as a delaying tactic.’ ” *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008) (quoting *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992)). “Factors to be considered include: whether defendant articulates an acceptable reason for desiring new counsel; whether the defendant has continuously been in custody; whether he has informed the trial court of his efforts to obtain counsel; whether he has cooperated with current counsel; and the length of time defendant has been represented by current counsel.” *Id.*

¶ 12 Our supreme court has made clear that “a trial court will not be found to have abused its discretion in denying a motion for substitution of counsel in the absence of ready and willing substitute counsel.” *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000). Thus, if new counsel is specifically identified and stands ready, willing, and able to enter an unconditional appearance, a motion for continuance should be allowed. However, if any of those requirements is lacking, a denial of the motion is not an abuse of discretion. See *People v. Koss*, 52 Ill. App. 3d 605, 607-08 (1977).

¶ 13 Here, defendant failed to show that substitute counsel was ready, willing, and able to enter an unconditional appearance. Instead the record shows that the counsel defendant sought had not

yet been retained. Further, the court noted the length of time the case had been pending and that trial essentially had already started in determining that the request was made for purposes of delay. Thus, under *Segoviano*, the court did not abuse its discretion when it denied the motion to continue.

¶ 14 Defendant argues that the fact that counsel was named and that his family was seeking to finish paying a retainer required the court to make further inquiry into the matter. He contends that several cases support his view. See, e.g., *People v. Green*, 42 Ill. 2d 555, 557 (1969); *Little*, 207 Ill. App. 3d at 725; *People v. Washington*, 195 Ill. App. 3d 520, 525-26 (1990). But in each of those cases, there was evidence that counsel had already been retained and, for various reasons, was unable to appear in court when the motion to continue was made. Here, counsel had not yet been retained. Only one case cited by defendant, *People v. Basler*, 304 Ill. App. 3d 230, 233 (1999), supports his view. There, the defendant had not yet retained counsel and the appellate court held that the trial court abused its discretion when it denied a motion to continue without further inquiry into whether the request was being made as a delay tactic. But that case was decided before *Segoviano*, which made clear that the trial court does not abuse its discretion when it denies a motion to continue in the absence of retained counsel.

¶ 15 Because defendant failed to show that substitute counsel was ready, willing, and able to enter an unconditional appearance, the trial court did not abuse its discretion when it denied his motion to continue. Thus there was no error, much less plain error. Accordingly, we affirm defendant's convictions.

¶ 16

B. DNA Analysis Fee

¶ 17 Defendant next argues that the \$200 DNA analysis fee, assessed under section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)), must be vacated, because the record shows that he previously submitted his DNA. The State agrees that the fee should be vacated.

¶ 18 “[S]ection 5-4-3 authorizes a trial court to order the taking, analysis and indexing of a qualifying offender’s DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database.” *People v. Marshall*, No. 110765, slip op. at 15 (Ill. May 19, 2011). When the defendant’s DNA is already registered in the DNA database, the fee is not authorized and it must be vacated. *Id.* In addition, the defendant does not forfeit the issue by failing to raise it below, because such an order is void and is not subject to forfeiture. *Id.* at 14.

¶ 19 Here, defendant previously submitted a DNA sample. Accordingly we vacate the \$200 DNA analysis fee.

¶ 20 III. CONCLUSION

¶ 21 The court did not err when it denied defendant’s motion to continue. However, the DNA analysis fee was improperly assessed. Accordingly, the judgment of the circuit court of Winnebago County is affirmed, but we vacate the \$200 DNA analysis fee.

¶ 22 Affirmed in part and vacated in part.